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No. 83-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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I

THIS COURT SHOULD GRANT REVIEW TO REINFORCE THE PRINCIPLE THAT THE LOWER COURTS DO NOT HAVE UNTRAMMELED EQUITABLE DISCRETION TO DENY RETROACTIVE APPLICATION TO THEIR DECISIONS

Respondent seeks to dissuade this Court from granting certiorari by arguing that the New Jersey Supreme Court merely exercised its broad discretion, engaging in an equitable balancing of multifarious factors, in concluding that New Yorkers were not entitled to refunds of sums collected under the unconstitutional Commuter Income Tax. But it is precisely *because* the New Jersey Supreme Court decided the retroactivity question in this case as though relief were a matter solely within its equitable discretion that this Court should grant

certiorari. Where, as here, the ruling declaring a statute unconstitutional was "clearly foreshadowed"—indeed, compelled—by a prior ruling of this Court, there is no room for equitable balancing. Any other approach would, as we stressed in our petition for certiorari, undermine the principle of *stare decisis* while simultaneously insulating lower court rulings from meaningful judicial review.

It has long been axiomatic that

> "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent, . . . or disrupts a practice long accepted and widely relied upon."

Milton v. *Wainwright*, 407 U.S. 371, 381-82 n.2 (1972) (Stewart, J., dissenting on other grounds). *Accord*, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971) ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968) (decision is retroactive unless it represents "a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979) (unless Court establishes " 'new standards' of constitutional law not evident" from prior decisions, the considerations that have led the Court "in other cases to depart from full retroactive application of constitutional holdings . . . are inapplicable").

As a matter of both logic and constitutional policy, the justification for a rule of presumptive retrospectivity[1] is unas-

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1 *See, e.g.*, *Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); *Cash* v. *Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *Kremer* v. *Chemical Const. Corp.*, 623 F.2d 786, 788-89 (2d Cir. 1980) (Friendly, J.), *aff'd on other grounds*, 456 U.S. 461 (1982).

sailable. If judicial decisions were held to have no application beyond the facts and parties directly involved, the rule of *stare decisis* would dissolve into a welter of particularistic case dispositions. "Balancing," as Judge Friendly has pointed out, would be required in every case. *Kremer, supra*, 623 F.2d at 789. Because judicial opinions have the force of law and are designed to be a guide to future conduct, a decision is applied retroactively if it simply restates existing law, or extends the law to apply to a new fact situation forseeably within the ambit of precedent. No different rule applies when the consequence of retroactivity is that a state must pay damages for transgressing such settled law.[2]

In light of this standard, respondent's contention that the decision below is not worthy of review by this Court is untenable. The New Jersey Supreme Court was plainly wrong to conclude that, as a matter of its equitable discretion, it had the power to defer the effectiveness of its decision invalidating the Commuter Income Tax until 1984, and to decline to award refunds of taxes collected under the unconstitutional statute. Indeed, the Court appears to have indulged in a *presumption* that its decision should be prospective only. Far from representing a radical shift in the interpretation of the Privileges and Immunities Clause, however, *Salorio* followed inexorably from, and was compelled by, this Court's decision in *Austin*. (*See* Petition for Certiorari at pp. 3-7 and pp. 5-9, *infra*.)

By relying on a congerie of factors of varying significance, ranging from the notion that *all* statutes are presumptively valid (a presumption clearly negated, in any case, by the New Jersey Court's 1980 ruling), to the effects of a "reciprocal arrangement" between New York and New Jersey (which the Court below had itself discredited in 1980 as a basis for the

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2 Among lower court decisions that have followed these principles by applying constitutional rulings retroactively and awarding damages against either the states or the federal treasury, *see, e.g., Cash, supra*, 621 F.2d at 630; *National Ass'n of Broadcasters* v. *F.C.C.*, 554 F.2d 1118 (D.C. Cir. 1976); *Hurvich* v. *Califano*, 457 F. Supp. 760, 762 (N.D. Cal. 1978); *Bethlehem Steel Corp.* v. *Board of Education*, 406 N.Y.S.2d 752, 755 (Ct. App. 1978); *Florida Dep't of Revenue* v. *Ford*, 417 So. 2d 1109 (Fla. App. 1982).

respondent's position),[3] to the State's reliance on the tax revenues in making appropriations, the Court below fashioned a "balancing test" where none was appropriate.

But the significance for *this* Court of the decision below extends well beyond the confines of a bad result in a particular case. Whatever the validity of the balancing approach in fashioning injunctive or other equitable relief where the rule of constitutional law announced is truly one of first impression, *see, e.g., Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), it can have no application when taxpayers seek refunds of taxes paid under a statute that was plainly unconstitutional under controlling law. The substitution of discretionary, ad hoc balancing tests for adherence to precedent as a basis for determining whether constitutional decisions should be afforded retrospective effect directly undermines *stare decisis*.

And such an approach carries with it other, subtler dangers as well. First, in the absence of assurance that damages will be awarded unless the constitutional ruling "marks a sharp break in the web of the law," *Milton*, *supra*, 407 U.S. at 381 n.2, state legislatures will have no incentive to comply in advance with constitutional norms, but will "gamble" as New Jersey did here.

Second, the corollary of indiscriminate application of a balancing test is that judicial review of such "discretionary" decisions would only be available in what respondent terms "extraordinary" circumstances. Simultaneously broadening the scope of discretion of the trial courts and narrowing the availability of meaningful appellate review of retroactivity rulings may, in itself, weaken the precedential effect and enforceability of this Court's rulings. Such a standard is particularly troubling in the context of challenges, such as this one, to the constitutionality of state tax statutes, which can only be litigated in the state courts. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1976).

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3 *See Salorio* v. *Glaser*, 414 A.2d 943, 956-58 (S. Ct.), *cert. denied*, 449 U.S. 879 (1980). *See also* Cross Respondents' Brief in Opposition to the Cross Petition for A Writ of Certiorari, filed simultaneously herewith, at 3-4, 7-12.

II

THE COMMUTER INCOME TAX IS INDISTINGUISHABLE FROM THE TAX INVALIDATED IN *AUSTIN*, AND RESPONDENT HAD NO REASONABLE BASIS FOR RELYING ON A PRESUMPTION OF ITS CONSTITUTIONALITY.

Respondent urges that he reasonably relied on the presumptive constitutionality of the Commuter Income Tax in collecting revenues from New Yorkers, and that, in any event, the "unique" transportation problems that the tax was designed to address distinguish it from the structurally identical tax invalidated in *Austin*. The record is all to the contrary; there was no basis for denying retroactive effect to the New Jersey Supreme Court's decision.

First, it is worth emphasizing that respondent did *not* rely on any pre-*Salorio* case law suggesting that the Commuter Income Tax was constitutional. Thus, unlike decisions in which this Court has directed that only prospective relief be awarded, *Salorio* neither overruled a prior decision nor invalidated a long-standing practice of unquestioned legitimacy. *Brown* v. *Louisiana*, 447 U.S. 323, 335 (1980). To the contrary, this Court's ruling in *Austin* (in which New Jersey submitted an *amicus* brief in support of the New Hampshire tax) made it clear that the New Jersey tax was constitutionally very vulnerable, to say the least. If any doubt remained, it was erased by the New Jersey Supreme Court in 1980, when it held that the tax could not be sustained on the record before it because the respondent had failed to carry his burden of proving that "non-residents are taxed only to the extent of their contribution to the transportation problem." 414 A.2d at 955-56.

Where, as here, New Jersey has been on notice since 1976 that the statute was under serious challenge, and that the consequences of its being declared unconstitutional could include the payment of refunds on a class-wide basis to affected New Yorkers, there can be no unfair surprise in ordering that refunds be paid from 1976, after *Austin* was decided—especially since respondent segregated Commuter Income Tax reve-

nues for several years after *Austin*, in recognition of its implications for the viability of the tax. *See National Ass'n of Broadcasters*, *supra*, 554 F.2d at 1132.[4]

Nor can respondent plausibly claim that, in contrast to *Austin*, New Jersey was faced with costs imposed on it by New York commuters. First, this distinction is meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there, necessarily imposing some cost or burden on the neighboring state. But *Austin* presented precisely this issue, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot justify a discriminatory tax. There is even less justification for such a tax where, as here, the prior history of the tax demonstrates that it was designed purely as a measure to divert revenue to New Jersey from New York, and that changes in rates have invariably been tied, not to transportation exigencies, but to New York's tax code. (Petition for Certiorari at 5.)[5]

Second, as even respondent concedes, the number of New York residents who commute to New Jersey is "substantially smaller" than that of their New Jersey counterparts. New Yorkers, of course, are therefore travelling *against* the peak flow of traffic at all peak hours. As a matter of both logic and

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4 Respondent makes much of the fact that petitioners did not apply for interim injunctive relief against enforcement of the statute. But in contrast to *Lemon*, *supra*, 411 U.S. 192, in which the ongoing harm to petitioners consisted of an entanglement between church and state not remediable through money damages, a motion for a preliminary injunction in *Salorio* clearly would have been met with the argument that, in the event the statute were ultimately declared unconstitutional, damages would provide full relief—the most traditional ground for denial of a preliminary injunction.

5 Respondent's contention that the "most significant" difference between this case and *Austin* is the existence of a joint press release issued by the Governors of New York and New Jersey in 1962, and dubbed an "interstate agreement" by respondent, is dealt with in detail in Cross Respondents' Brief in Opposition to the Cross Petition for Certiorari, filed simultaneously herewith.

fact proven below, then, the vast preponderance of commuter transportation expenses cannot be attributable to New Yorkers travelling to New Jersey, but to New Jersey's own residents, who would need precisely the same facilities even if *no* New Yorkers commuted across the river.[6]

Third, as the New Jersey Supreme Court found, the revenues from the Commuter Income Tax have been used to subsidize a "very substantial portion" of state expenditures for *intra-state* transportation facilities that are rarely used by New Yorkers. 414 A.2d at 954 & n.22. Under these circumstances, it can hardly be urged that the Commuter Income Tax was a carefully tailored response to the "peculiar burdens" supposedly imposed on New Jersey transportation facilities by New Yorkers. *See, e.g., Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978).

But the statistics in the record bear out even more clearly what common sense tells us must be so. Thus, New Yorkers account—at most—for only 1% of the total usage of transportation facilities in Northern New Jersey.[7] And the record evidence demonstrated that any costs occasioned by such usage was more than defrayed by payments by New York commuters of New Jersey's gasoline tax alone. In the face of this evidence (and despite statements in respondent's brief to the contrary) *neither* respondent's experts, *nor* the trial judge, *nor* the New Jersey Supreme Court, concluded that New Yorkers were a peculiar source of any transportation problem or that they "substantially exacerbated" it. At best, one of respondent's experts, having conceded that the "extraordinary commutation

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6 Astonishingly, respondent and his experts have taken the position that in assessing the incremental costs New Yorkers impose on New Jersey transportation facilities, it is *irrelevant* that they travel against the peak flow of traffic at peak hours (Petitioner's Appendix at A35).

7 A good example of respondent's whimsical way with statistical evidence is found in his brief in opposition to the petition for certiorari in this Court (at 3), in which he states that over *7 million* persons cross the Hudson River each day between New York and New Jersey. In fact, this number represents the total number of persons who travel from home to work in the entire New York-New Jersey metropolitan area (A32).

problem" was caused by vast numbers of New Jerseyans commuting to New York, could only conclude lamely:

> "I determined that the New York commuter is part of the transportation problem which is entirely a problem of commuter overload. *Any* increment that adds to that, adds to the overload."

Nor did the Court below adopt as a factual finding the contention that the costs attributable to New York commuters amounted to $182 million annually, as respondent repeatedly iterates. The Court stated that it need not resolve petitioners' challenge to "nearly every element" of respondent's allocation of expenditures, because it concluded that "*even if* these allocation charges are not overstated," the Commuter Income Tax revenues, which were *indisputably twice* that sum, did not bear a substantial relationship to the burdens imposed by New Yorkers on the transportation system (Petitioners' Appendix at A14) (emphasis supplied).[8]

Significantly, the Court below did *not* conclude that respondent could reasonably have relied on a belief that the Commuter Income Tax was adapted to a peculiar transportation problem caused by New Yorkers. Instead, the Court simply pointed to the presumptive constitutionality of *all* legislation, and went on to note that state officials relied on the *income* from the tax in making budgets, appropriations and expenditures (Petitioners' Appendix at A18). In short, New Jersey officials, far from relying on any genuine "fit" between tax revenues exacted from New Yorkers and New Jersey's

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8 Given the absurdities in the methods and evidence used by respondent to arrive at the $182 million figure, it would have been surprising indeed if the Court below had accepted it. Thus, for example, the cost allocation presented by one of respondent's experts concluded that New York commuters account for *twenty times* the costs posited by respondent's other expert. (This same expert assumed that, but for commuters, virtually *no* new roads would have been built or improved in New Jersey since 1960, and that a passenger car causes precisely the same damage to a road as a fully loaded truck—testimony that the trial court flatly rejected.)

transportation costs,[9] simply took a gamble that the Commuter Income Tax would be upheld, or that, if invalidated, no refunds would be awarded. Such a gamble is not entitled to the solicitude evinced by the Court below.[10]

Ultimately, respondent's argument, and the decision of the Court below, boils down to the proposition that the money involved here has already been spent by the State of New Jersey, and that any award of damages would have an impact (amounting, at most, to 4% of one year's budget) on the State's fisc. But, obviously, this argument proves far too much.[11] If accepted here, in the face of the clear ruling from this Court in *Austin* striking down an identical tax, and in the absence of any justifiable reliance by respondent, it is hard to see under what circumstances such relief could ever be awarded.

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9 In this connection, it is striking that respondent's cross petition, which seeks review of the decision below to the extent that it invalidated the Commuter Income Tax, abandons entirely any argument that the tax is constitutional because it meets transportation costs. Indeed, the only arguments raised in the cross petition are those that were *rejected* by the New Jersey Supreme Court in 1980. *See* Cross Respondents' Brief in Opposition to the Cross Petition for Certiorari, filed simultaneously herewith.

10 That respondent's gamble was an unreasonable one was immediately evident to at least one interested observer, the Governor of Connecticut. After the trial court sustained the constitutionality of the tax in 1982, the Connecticut legislature passed a comparable commuter income tax. Governor O'Neill vetoed it, declaring (in a letter that is part of the record below) that the tax was clearly unconstitutional under *Austin*, and that Judge Petrella's ruling would ultimately be overturned on appeal.

11 *See Cash*, *supra*, 621 F.2d at 632 ("A financial impact alone is an insufficient basis to mandate nonretroactivity").

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the prospective aspect of the judgment of the Supreme Court of New Jersey.

November 7, 1983

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